



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–R8–ES–2011–0013]**

**[4500030114]**

**RIN 1018-AX15**

### **Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for Riverside Fairy Shrimp**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis, and amended required determinations.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on the June 1, 2011, proposed revised designation of critical

habitat for Riverside fairy shrimp (*Streptocephalus woottoni*) under the Endangered Species Act of 1973, as amended (Act). We are revising the preamble to the proposed designation to clarify that certain subunits that we originally proposed for revised critical habitat designation under section 3(5)(A)(i) of the Act, are now also being proposed under section 3(5)(A)(ii) of the Act because these areas are essential for the conservation of the species but were not confirmed to be occupied by Riverside fairy shrimp at the time the species was listed in 1993. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of revised critical habitat for Riverside fairy shrimp and an amended required determinations section of the proposal. We are reopening the comment period for an additional 30 days to allow all interested parties an opportunity to comment simultaneously on the proposed revised critical habitat designation, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

**DATES:** We will consider comments received on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

**ADDRESSES:** You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

*<http://www.regulations.gov>. Search for Docket No. FWS-R8-ES-2011-0013,*

which is the docket number for this rulemaking.

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2011–0013; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments **only** by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments** below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments**

We will accept written comments and information during this reopened comment period on our proposed revised designation of critical habitat for Riverside fairy shrimp

published in the **Federal Register** on June 1, 2011 (76 FR 31686), our DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) Areas that provide habitat for Riverside fairy shrimp that we did not discuss in our proposed revised critical habitat rule (76 FR 31686; June 1, 2011);

(b) Areas containing the physical and biological features essential to the conservation of Riverside fairy shrimp that we should include in the final revised critical habitat designation and why. Include information on the distribution of these essential features and what special management considerations or protections may be required to maintain or enhance them;

(c) Areas proposed as revised critical habitat that do not contain the physical and biological features essential for the conservation of the species and that should not be designated as critical habitat;

(d) Areas not occupied or not known to be occupied at the time of listing that are essential for the conservation of the species and why; and

(e) The potential effects of climate change on Riverside fairy shrimp and its habitat and whether the critical habitat may adequately account for these potential effects.

(3) Our proposal to designate specific areas for which there is no documentation of occupancy for the specific areas (subunits) prior to 1993, as essential for the conservation of the species under the definition of critical habitat in section (3)(5)(A)(ii) of the Act.

(4) Lands we identified as essential for the conservation of Riverside fairy shrimp in Appendix F of the Recovery Plan that are not being proposed as critical habitat.

(5) Lands we have identified as essential for the conservation of Riverside fairy shrimp that were not known at the time the Recovery Plan was written but that we conclude are essential for the conservation of the species.

(6) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(7) Information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of Riverside fairy shrimp.

(8) Whether any specific areas being proposed as revised critical habitat for Riverside fairy shrimp should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act. See the **Exclusions** section of the June 1, 2011, proposed rule to revise critical habitat (76 FR 31686) for further discussion.

(9) Any probable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(10) Information on the extent to which the description of probable economic impacts in the DEA is complete and accurate, and specifically:

(a) Whether there are incremental costs of critical habitat designation (for example, costs attributable solely to the designation of revised critical habitat for Riverside fairy shrimp) that have not been appropriately identified or considered in our economic analysis, including costs associated with future administrative costs or project modifications that may be required by Federal agencies related to section 7 consultation under the Act;

(b) Whether there are additional project modifications that may result from the designation of critical habitat for Riverside fairy shrimp and what those potential project modifications might represent.

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to better assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed revised rule (76 FR 31686) during the initial comment period from June 1, 2011, to August 1, 2011, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat for Riverside fairy shrimp will take into consideration all written comments and any additional information we receive during this and previous comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hard copy comment that includes personal identifying information, you may request at the top

of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R8–ES–2011–0013, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule (76 FR 31686) and the DEA on the Internet at <http://www.regulations.gov> at Docket No. FWS–R8–ES–2011–0013, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## **Background**

It is our intent to discuss only those topics directly relevant to the designation of revised critical habitat for Riverside fairy shrimp in this document. For more information on the taxonomy, biology, and ecology of Riverside fairy shrimp, please refer to the listing rule published in the **Federal Register** on August 3, 1993 (58 FR 41384), the 5-Year Review for Riverside fairy shrimp signed on September 30, 2008 (Service 2008), which is available online at <http://www.fws.gov/carlsbad/>, and our proposed revised critical habitat designation published in the **Federal Register** on June 1, 2011 (76 FR 31686), which is available online at <http://www.regulations.gov> (at Docket No. FWS–



R8-ES-2011-0013), or contact the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

*Previous Federal Actions*

On April 12, 2005, we published a final designation of critical habitat for Riverside fairy shrimp in the **Federal Register** (70 FR 19154). On January 14, 2009, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California challenging our 2005 designation of critical habitat for Riverside fairy shrimp (*Center for Biological Diversity v. United States Fish and Wildlife Service and Dirk Kempthorne, Secretary of the Interior*, Case No. 3:09-CV-0050-MMA-AJB). The plaintiffs alleged that our April 12, 2005, critical habitat designation for Riverside fairy shrimp was insufficient for various reasons, specifically challenging the reasoning used to exclude areas from the 2005 critical habitat designation for Riverside fairy shrimp and citing improper use of a coextensive economic analysis. A settlement agreement was reached with the plaintiffs (Case No. 3:09-cv-00051-JM-JMA; November 16, 2009) in which we agreed to submit a proposed revised critical habitat designation for the Riverside fairy shrimp to the **Federal Register** by May 20, 2011, and submit a final revised critical habitat designation to the **Federal Register** by November 15, 2012.

On June 1, 2011, we published a proposed rule to designate revised critical habitat for the Riverside fairy shrimp (76 FR 31686). We proposed to designate approximately

2,984 acres (1,208 hectares) of land in five units in Ventura, Orange, Riverside, and San Diego Counties, California, as revised critical habitat. That proposal had a 60-day comment period, ending August 1, 2011.

### *Critical Habitat*

Section 3(5)(A)(i) of the Act defines critical habitat as “the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” Section 3(5)(A)(ii) pertains to “specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.” Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary. For more information on critical habitat, please refer to our proposed revised critical habitat designation published in the **Federal Register** on June 1, 2011 (76 FR 31686).

As stated in the proposed rule (76 FR 31692: June 1, 2011), when we are determining which areas should be designated as critical habitat or revised critical habitat, our primary source of information is generally the listing information developed

during the listing process for the species. However, section 4 of the Act also requires that we designate critical habitat, or make revisions to, critical habitat on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts.

In proposing revised critical habitat for Riverside fairy shrimp, we have made extensive use of the information in the Recovery Plan (Service 1998), and incorporated the recovery goals and strategy identified in the Recovery Plan. We also reviewed other relevant information, including peer-reviewed journal articles, unpublished reports and materials (e.g., survey results and expert opinions), the final listing rule (58 FR 41384; August 3, 1993), the first and second rules proposing critical habitat published in the **Federal Register** on September 21, 2000 (65 FR 57136), and April 27, 2004 (69 FR 23024), respectively; and the subsequent final critical habitat designations published in the **Federal Register** on May 30, 2001 (66 FR 29384), and April 12, 2005 (70 FR 19154), the 5-year review for the Riverside fairy shrimp (Service 2008), and regional databases and GIS coverages, for example, California Natural Diversity Database, and National Wetlands Inventory maps. We analyzed this information to determine historical occupancy, occupancy at the time of listing, and current occupancy. Additionally, we reviewed available information pertaining to the species' habitat requirements and its distribution.

The geographical area known to be occupied by the species in the U.S. as presented in the listing rule (58 FR 41385; August 3, 1993) is that area bounded by the coastline to

the west, east to an area near tribal land of the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California, in western Riverside County, north into the central foothills of Orange County near the former Marine Corps Air Station (MCAS) El Toro, and south to coastal mesa tops along the United States-Mexico Border in San Diego County. The current known range of Riverside fairy shrimp is from Ventura County to the United States-Mexico Border in San Diego County, a north-south distance of approximately 163 miles (mi) (262 kilometers (km)) within southern California and inland from the Pacific Coast 50 mi (80 km), based on all available species occurrence data pre- and post-listing. (Two additional records documented Riverside fairy shrimp in northwestern Baja California, Mexico, at the time the species was listed (58 FR 41385)). Extant occurrences are located within four counties in southern California: Ventura, Orange, Riverside, and San Diego.

When we developed our proposed critical habitat, we considered areas where Riverside fairy shrimp have been documented since listing (1993), including areas outside the geographical range of the species as presented in the listing rule, to be “within the geographical area occupied by the species at the time of listing [in 1993]” (see proposed rule at 76 FR 31689; June 1, 2011 and discussion below). Based on our review of the species biology and life-history traits, we conclude that occurrences documented since the 1993 listing do not represent an expansion of the species’ distribution and range, but rather reflect our better understanding of the distribution and range of the species at the time of listing (Service 2008, p. 9).

We acknowledge that the geographical range *known* to be occupied by the species at the time of listing in the U.S. (based on species occurrence records available at the time the species was listed (58 FR 41384; August 3, 1993)) is from central Orange County to southwestern San Diego County at the United States-Mexico Border. However, as with many species, listing often results in greater efforts to conduct surveys that may reveal more information related to specific occurrences across a greater geographical area than were initially known (76 FR 31690; June 1, 2011).

Our method for identifying areas with physical and biological features essential to the conservation of the species and other areas essential for the conservation of Riverside fairy shrimp, has been to target areas occupied by Riverside fairy shrimp, and areas known to possess suitable ephemeral wetland habitat likely to be occupied or become occupied based on proximity to known occurrences, contiguous habitat, or within expected dispersal distances for Riverside fairy shrimp. We considered the low numbers of populations, restricted distribution, specialized habitat requirements, and limited genetic variability of Riverside fairy shrimp, and while we did not include all available habitat or all areas where Riverside fairy shrimp are located, criteria used to identify those areas essential for the conservation of Riverside fairy shrimp include areas of discontinuous habitat that: (1) Provide for geographic distribution across the range of the species; (2) represent the full range of habitat and environmental variability that the species occupies; (3) provide appropriate inundation and ponding durations, natural hydrologic regimes and appropriate soils, and intermixed wetland and upland watershed

(that is, contain the necessary primary constituent elements (PCEs)); (4) provide for connectivity among pools within geographic proximity to facilitate dispersal and gene flow among vernal pool complexes; and (5) provide protection for unique, existing vernal pool composition and structure. Our determination of habitat, and therefore features, essential to the conservation of Riverside fairy shrimp takes into consideration the generalized conservation strategy identified in the 1998 Recovery Plan as necessary for the species stabilization and reclassification (Service 1998, pp. 1-113 and Appendices F and G therein). For more information on how critical habitat units and subunits were identified and delineated and additional information regarding the Recovery Plan, please also see the “Methods” section of the proposed revised critical habitat rule we published on June 1, 2011 (76 FR 31686).

Specific areas identified for inclusion into revised critical habitat were determined first at the unit level (based on Management Area (Units 1–5) provided in the Recovery Plan (Service 1998, p.38)). We delineated subunit boundaries by focusing on areas known or likely to be occupied based on species occurrence records and the presence of PCEs within each subunit. We mapped essential physical and biological features and then applied selection criteria to identify those areas essential to the conservation of Riverside fairy shrimp. We proposed to designate subunits within the geographical area occupied by the species at the time it was listed, as currently understood. As discussed below, based on information regarding the geographical area occupied by the species at the time it was listed, and the limited surveys verifying occupancy of many specific pools

prior to listing, we are now also proposing certain subunits as essential for the conservation of the species under section 3(5)(A)(ii) of the Act.

We have not proposed for designation certain areas identified in the Recovery Plan that: (1) Lack a confirmed identification of species occurrence, (2) lack essential physical and biological features to support Riverside fairy shrimp in a self-sustaining population, or (3) do not represent occupied occurrences that add to species viability and, therefore, that we do not consider to be essential for the recovery of the species at this time. Specifically, we determined these areas are not essential for the conservation of the species because: (1) The original record of species occurrence, or current species persistence, remains questionable and unconfirmed; (2) specific occupied pools or their watersheds have been so highly modified or degraded that the long-term viability of the population is unlikely and the functional value of enhancing or restoring the existing habitat to assist in recovery is minimal; (3) they do not possess, or likely will not retain (if restored), the necessary physical and biological features (soils, hydrology, topography) to support and maintain a self-sustaining population of Riverside fairy shrimp; or (4) the area supports an occurrence that does not appreciably add to the species viability at the unit or subunit level, therefore, the area is not essential for the recovery of the species.

We initially proposed Unit 1 (1a and 1b), Unit 2 (2dA, 2dB, 2e, 2f, 2g, 2h, and 2i), Unit 3 (3c, 3d, 3e, and 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5e, 5f, 5g, and 5h) for designation as revised critical habitat under section 3(5)(A)(i) of the Act because the areas contain physical and biological features essential to the conservation of the species

that may require special management considerations or protection and we considered the areas to be within the geographical range occupied by the species at the time of listing. Because we lack surveys confirming the presence of Riverside fairy shrimp in these areas at the time of listing, we are now also proposing them for designation under section 3(5)(A)(ii) of the Act. We have determined that the areas are essential to the conservation of the species as presented below (Table 1). Since the time of listing we have also confirmed the areas are occupied by Riverside fairy shrimp.

Table 1. Subunit occupancy status and justifications for determining specific areas essential to and for the conservation of Riverside fairy shrimp.

<b>Unit/ Subunit: name<sup>1</sup></b>	<b>Service status at listing<sup>2</sup></b>	<b>Current status<sup>3</sup>; year of first record<sup>4</sup></b>	<b>ESA section 3(5)(A)(i) Justification<sup>5</sup></b>	<b>ESA section 3(5)(A)(ii) justification<sup>6</sup></b>
<b><i>Ventura County</i></b>				
<b>1a: Tierra Rejada Preserve</b>	Presumed occupied	Occupied; 1998 (CNNDB, EO 9)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; possesses unique soils and habitat type; disjunct population which maintains genetic diversity and population stability at species' northernmost distribution



<b>1b: South of Tierra Rejada Valley (east of Hwy 23)</b>	Presumed occupied	Presumed occupied; no protocol surveys have been completed	Has PCEs 1–3; may require management	Provides appropriate inundation ponding; proximity and connectivity to 1a at northern distribution; protects existing vernal pool composition; ecological linkage
<b><i>Orange County</i></b>				
<b>2c: (MCAS) El Toro</b>	Confirmed occupied	Occupied; 1998 (CNDDB, E0 10)	Has PCEs 1–3; may require management	--
<b>2dA: Saddleback Meadow</b>	Presumed occupied	Occupied; 1997 (HELIX 2009, Report #10537)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; maintains current geographic, elevation, and ecological distribution; maintains current population structure; provides for connectivity; large continuous block; ecological linkage
<b>2dB: O’Neil Regional Park—near Trabuco Canyon</b>	Presumed occupied	Occupied; 2001 (CNDDB, EO 17)	Has PCEs 1–3; may require management	Maintains current geographic, elevation, and ecological distribution; maintains current population structure; provides for connectivity

<b>2e: O’Neil Regional Park—near Canada Gobernadora/ east of Tijeras Creek</b>	Presumed occupied	Occupied; 1997 (CNDDDB, EO 4)	Has PCEs 1–3; may require management	Maintains current geographic, elevation, and ecological distribution; maintains current population structure; provides for connectivity
<b>2f: Chiquita Ridge</b>	Presumed occupied	Occupied; 1997 (CNDDDB, EO 5)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; maintains current geographic, elevation, and ecological distribution; maintains current population structure; provides for connectivity
<b>2g: Radio Tower Road</b>	Presumed occupied	Occupied; 2001 (CNDDDB, EO 15, 16)	Has PCEs 1–3; may require management	Maintains current geographic, elevation, and ecological distribution; maintains current population structure; provides for connectivity
<b>2h: San Onofre State Beach, State Park—leased land (near Christianitos Creek)</b>	Presumed occupied	Occupied; 1997 (CNDDDB, EO 6)	Has PCEs 1–3; may require management	Unique soils and wetland type, maintains habitat function, genetic diversity and species viability; ecological linkage
<b>2i: SCE Viejo Conservation Bank</b>	Presumed occupied	Occupied; 1998 (CNDDDB, EO 10)	Has PCEs 1–3; may require management	Maintains current geographic, elevation, and ecological distribution; maintains current population structure; provides for connectivity
<b><i>Riverside County</i></b>				

<b>3c: Australia Pool</b>	Presumed occupied;	Occupied; 1998 (CNDDDB, EO 11)	Has PCEs 1–3; may require management	Maintains habitat function, genetic diversity and species viability; ecological linkage
<b>3d: Scott Road Pool</b>	Presumed occupied	Occupied; 2002 (CNDDDB, EO 24)	Has PCEs 1–3; may require management	Maintains current geographic, elevation, and ecological distribution; disjunct habitat
<b>3e: Schleuniger Pool</b>	Presumed occupied	Occupied; 1998 (CNDDDB, EO 8)	Has PCEs 1–3; may require management	Maintains current geographic, elevation, and ecological distribution
<b>3f: Skunk Hollow and Field Pool</b>	Confirmed occupied	Skunk Hollow: Occupied; 1988 (CNDDDB, EO 3), Field Pool: Occupied; 1988 (Service, GIS ID 9)	Has PCEs 1–3; may require management	--
<b>3g: Johnson Ranch Created Pool</b>	Created (in 2002)	Occupied; 2003 (Service, GIS ID 13)	Has PCEs 1–3; may require management	Provides for connectivity among pools; maintains current population structure
<b>3h: Santa Rosa Plateau–Mesa de Colorado</b>	Presumed occupied	Occupied; 2009 (Selheim and Searcy 2010, Report # 11005)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; unique soils and habitat type; large continuous blocks of occupied habitat; ecological linkage
<b><i>San Diego County</i></b>				

<b>4c: Poinsettia Lane Commuter Train Station (JJ 2)</b>	Presumed occupied	Occupied; 1998 (CNDDDB, EO 7)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; unique soils and habitat type; disjunct habitat; provides protection for existing vernal pool composition and structure
<b>5a: J 33 (Sweetwater High School)</b>	Presumed occupied	Occupied; 2003 (City of San Diego, 2004)	Has PCEs 1–3; may require management	Maintains current population structure; genetic diversity
<b>5b: J15 (Arnie's Point)</b>	Presumed occupied;	Occupied; 2006 (ERS, Report # 8639)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; maintains current population structure; ecological linkage
<b>5c: East Otay Mesa</b>	Presumed occupied	Occupied; 2000 GIS ID 4; 2001 (EDAW 2001) (CNDDDB, EO 25)	Has PCEs 1–3; may require management	Unique soils and habitat type; maintains current geographic, elevation, and ecological distribution; disjunct habitat; protects existing vernal pool composition
<b>5d: J29–31</b>	Confirmed occupied	Occupied; 1986 (Bauder 1986); (Simovich and Fugate 1992) (CNDDDB, EO 2)	Has PCEs 1–3; may require management	--
<b>5e: J2 N, J4, J5</b>	Presumed occupied	Occupied; 2003 (City of San Diego, 2004)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; provides for connectivity among pools; maintains current population structure

<b>5f: J2 S and J2 W</b>	Presumed occupied	Occupied; 2001 (CNDDDB, EO 18)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; provides for connectivity among pools; maintains current population structure
<b>5g: J14</b>	Presumed occupied	Occupied; 2002 (HELIX 2002, Report # 2386)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; provides for connectivity among pools; maintains current population structure
<b>5h: J11, J12, J16–19</b>	Presumed occupied	Occupied; 2002 (City of San Diego, 2004)	Has PCEs 1–3; may require management	Necessary to stabilize in RP; provides for connectivity among pools; maintains current population structure

<sup>1</sup> Unit/Subunit name as it appears in Table 1 of proposed revised rule (76 FR 31698–31699). For additional information, see the Recovery Plan (RP) for Vernal Pools of Southern California (Service 1998, 113+ pp.).

<sup>2</sup> Service status: “Confirmed occupied” means that there is a record of occupancy at or before the time of listing; “Presumed occupied” means there is no documentation of occupancy for the specific areas (subunits) prior to 1993, but the areas are presumed to have been occupied at the time of listing based on best available science and positive survey results in the possession of the Service. “Created” refers to a vernal pool enhancement or restoration after the time of listing.

<sup>3,4</sup> Current status: “Occupied” indicates a positive survey result after the time of listing documenting the species occurrence and “presumed occupied” indicates no protocol surveys have been completed. The listed year indicates the year of first record followed by source. EO (element occurrence) is the number assigned to that occurrence, as defined and described according to the California Natural Diversity Data Base (CNDDDB 2011). GIS ID is the number of the occurrence information for multiple species within jurisdiction of the Carlsbad Fish and Wildlife Office (Service 2011). City of San Diego (2004) is from the “Vernal pool inventory 2002–2003” or Contractor, and Report # is the number from a section 10(A)(1)(a) survey report, available in Service files.

<sup>5</sup> Reason/s determined essential to the conservation of the species as defined according to criteria set forth in the proposed revised critical habitat rule, this document, and in section 3(5)(A)(i) of the Act and based on current information of what we consider the occupied geographic range of the species at the time of listing.

<sup>6</sup> Reason/s determined essential for the conservation of the species as defined according to criteria set forth in the proposed revised critical habitat rule, this document, and in section 3(5)(A)(ii) of the Act. RP = Recovery Plan (see Service 1998, Appendix F, pp. F-1 to F-5). An empty box in the “ESA section 3(5)(A)(ii) justification” column indicates this subunit not proposed under section 3(5)(A)(ii) of the Act, and was confirmed occupied at the time of listing (see footnote 3).

The proposed revised rule explains in detail the bases for our determination that Unit 1 (1a and 1b), Unit 2 (2dA, 2dB, 2e, 2f, 2g, 2h, and 2i), Unit 3 (3c, 3d, 3e, and 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5e, 5f, 5g, and 5h) are essential to the conservation of Riverside fairy shrimp (76 FR 31686). Although the discussion of each subunit in the proposed revised rule occurs in the context of section 3(5)(A)(i) of the Act, the reasons identified in the proposed revised rule fully support designation of each of the subunits under section 3(5)(A)(ii) of the Act.

As stated in the proposed revised critical habitat rule (76 FR 31690; June 1, 2011), pursuant to section 3(5)(A)(i) of the Act we consider Unit 1 (1a and 1b) Unit 2 (2c, 2dA, 2dB, 2e, 2f, 2g, 2h, and 2i), Unit 3 (3d, 3e, and 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5e, 5f, 5g, and 5h) to be specific areas within the geographical area occupied by Riverside fairy shrimp at the time it was listed (although not all subunits were surveyed prior to listing) on which are found those physical or biological features essential to the conservation of the species which may require special management considerations or protection, and our rationale is explained below. We also have determined that these specific areas are essential for the conservation of Riverside fairy shrimp pursuant to section 3(5)(A)(ii) of the Act.

We propose 21 subunits (Subunits 1a, 1b; 2dA, 2dB, 2e, 2f, 2g, 2h, and 2i; Subunits 3c, 3d, 3e, and 3h; Subunit 4c; Subunits 5a, 5b, 5c, 5e, 5f, 5g, and 5h) under both section 3(5)(A)(i) and section 3(5)(A)(ii) of the Act to make clear that we consider these specific areas to be essential for the conservation of Riverside fairy shrimp notwithstanding the absence of surveys confirming the presence of Riverside fairy shrimp at the time of listing. Although evidence suggests that these subunits were occupied by the Riverside fairy shrimp at the time the species was listed, due to a lack of documentation of occupancy, such as survey results prior to 1993, for the purposes of this rulemaking, we determine that these subunits also meet the definition of critical habitat in section 3(5)(A)(ii) of the Act. The following paragraphs explain our determination, which applies to the following units and subunits—Unit 1 (1a, 1b), Unit 2 (2dA, 2dB, 2e, 2f, 2g, 2h, and 2i), Unit 3 (3c, 3d, 3e, and 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5e, 5f, 5g, and 5h ).

The Riverside fairy shrimp is a narrow endemic species that is imperiled due to historical and ongoing land use practices that have resulted in significant loss of habitat in southern California. The Recovery Plan states that conservation of most of the remaining occupied occurrences of Riverside fairy shrimp, as well as restorable habitat, is essential to the preservation of the remaining diversity and the prevention of further losses (Service 1998, p. 46) and is essential if Riverside fairy shrimp is to recover (Service 1998, pp. 62–64). Limiting the designation to subunits that were known to be occupied at the time of listing (positive pre-listing survey results) would result in the exclusion of most of the areas currently known to support viable Riverside fairy shrimp populations

and would result in a designation that is inadequate to provide for the conservation of the species. Therefore, we are proposing to designate Unit 1 (1a and 1b), Unit 2 (2dA, 2dB, 2e, 2f, 2g, 2h, and 2i), Unit 3 (3c, 3d, 3e, and 3h), Unit 4 (4c), and Unit 5 (5a, 5b, 5c, 5e, 5f, 5g, and 5h) under section 3(5)(a)(ii) of the Act as well as under section 3(5)(a)(i) of the Act because they consist of areas essential for the conservation of the species, are known to support Riverside fairy shrimp (with the exception of Subunit 1b), and contain physical and biological features essential to the conservation of the species. This proposed designation is based on the best scientific information available to us at this time.

Units 1–5, which include Ventura County Unit (Transverse Range; Unit 1), Los Angeles Basin–Orange County Unit (Unit 2), Riverside Inland Valleys Unit (Unit 3), San Diego North and Central Coastal Mesas Unit (Unit 4), and San Diego Southern Coastal Mesas Unit (Unit 5) comprise specific areas (subunits) within the geographical area occupied by the species at the time it was listed based on our current understanding (as previously discussed above), that we have also determined are essential for the conservation of Riverside fairy shrimp.

These units and subunits are necessary to stabilize existing populations of Riverside fairy shrimp (See Appendix F in the Recovery Plan for Vernal Pools of Southern California (hereafter, “Recovery Plan”) Service 1998, pp. F–1 to F–5) and are needed to meet recovery goals identified in the Recovery Plan. [The Recovery Plan identifies securing and conserving most of the remaining Riverside fairy shrimp



occurrences from further loss and degradation in a configuration that maintains habitat function and species viability (Service 1998, p. 62) as necessary for recovery of the species]. The Recovery Plan specifically identifies securing from loss and degradation existing vernal pools and their associated watersheds within the Transverse and Los Angeles Basin-Orange Management Areas as a recovery criterion (Service 1998, p. 62). The Recovery Plan also identifies remaining vernal pools and their watersheds contained within the complexes identified in Appendix F, secured in a configuration that maintains habitat function and species viability, as needed for recovery of Riverside fairy shrimp (Service 1998, p. 63).

Post-listing surveys in each of the units and subunits have confirmed the presence of Riverside fairy shrimp. As indicated in the Recovery Plan for Vernal Pools of Southern California, a key conservation goal for Riverside fairy shrimp is protection of most of the remaining Riverside fairy shrimp occurrences (securing from further loss and degradation) in a configuration that maintains habitat function and species viability (Service 1998, p. 62). Each of the areas (subunits) contain essential habitat that supports or can support viable occurrences of this extremely endangered species and is necessary for its eventual recovery.

At the time of listing, Riverside fairy shrimp were known to occupy nine vernal pool complexes within Orange, Riverside, and San Diego Counties, and Baja California, Mexico, including four vernal pools in Riverside County, one population in Orange County, two areas in San Diego County, and two locations in Baja California, Mexico

(58 FR 41384). All observed occurrences at that time were within 30 mi (48 km) of the coast. Most of the additional complexes identified since the time of listing (post-1993) fall within the extant range of the Riverside fairy shrimp known at the time of listing. The necessary conditions for vernal pool presence—Mediterranean climate, topographic depressions, and soils with poor drainage—were all present within the species' known range, and these conditions strongly support the conclusion that additional occupied vernal pools and pool complexes containing Riverside fairy shrimp existed within the species' known range that simply had not been surveyed for the species at the time of listing.

The species was first collected in 1979, and recognized as a new species in 1985. The species description was published in 1990 (Eng *et al.* 1990, pp. 258–259), and Riverside fairy shrimp was federally listed as endangered in 1993 (58 FR 41384). Listing typically results in greater efforts to conduct surveys which often reveal a greater number of occurrences than were initially known. Given the relatively short time period from when Riverside fairy shrimp was identified and published as a new species (1990) to when original or new survey efforts were completed (generally in the late 1980s and early 1990s, and again in 1997–early 2000s) and given the species' habitat, ecology, and life-history requirements (see following paragraphs below), the best scientific evidence suggests Riverside fairy shrimp were present and persisted in suitable seasonal depression wetlands with appropriate soils and microtopography within the geographical area known to be occupied by the species at the time it was listed. This conclusion is

substantiated by the high number of additional occurrences identified since the time of listing (1993) from surveys conducted in locations that were not surveyed before 1993.

Riverside fairy shrimp are relatively sedentary and possess limited dispersal capabilities (Davies *et al.* 1997, p. 157). Dispersal is assumed to be through passive means including movement of diapausing cysts by rain and overponding of water (Zedler 2003, p. 602) and wind (Brendonck and Riddoch 1999, p. 67; Vanschoenwinkel 2008, pp.130–133), or actively through animal-mediated transport (Keeler-Wolf *et al.* 1998, p. 11; Bohonak and Jenkins 2003, p. 784; Green and Figuerola 2005, p. 150); however, evidence of passive dispersal remains limited and the relative role of vertebrate vectors requires additional studies (see Bohonak and Jenkins 2003, p. 786). Riverside fairy shrimp have a relatively long maturation time (Simovich 1998, p. 111), which limits the species to deeper pools with longer ponding durations (Hathaway and Simovich 1996, p. 675). Riverside fairy shrimp exhibit a diversified bet-hedging reproductive strategy (Simovich and Hathaway 1997, p. 42) in which the species partitions reproductive effort over more than one hydration event and utilizes diapause of eggs (production of cyst bank) and the fractional hatching of the egg (cyst) bank (Simovich and Hathaway 1997, p. 42; Philippi *et al.* 2001, p. 392; Ripley *et al.* 2004, p. 222).

Riverside fairy shrimp are restricted to certain pool types (deep, long-ponding along coastal mesas or in valley depressions) with certain underlying soils (Bauder and McMillian, p. 57), which have variable but specific water chemistry (Gonzalez *et al.* 1996, p. 317) and temperature regimes (Hathaway and Simovich 1996, p. 672). Suitable

pools are geographically fixed and limited in number, and influenced by position, distance from coast, and elevation (Bauder and McMillian 1998, pp. 62 and 64). Typically, mounds of soil (mima) topography and impervious soils with a subsurface clay or hardpan layer provide the necessary ponding opportunities during winter and spring (Zedler 1987, pp. 13 and 17). Underlying soil types and pool size influence the wetland habitats' physiochemical parameters, associated vegetation, and faunal communities, as do regional climate (rainfall; temperature; evaporation rate) and elevation differences (Keeler-Wolf *et al.* 1998, p. 9). Vernal pools are discontinuously distributed in several regions in southern California, and Riverside fairy shrimp may be well adapted to the ephemeral nature of its habitat and to the localized climate, topography, and soil conditions (Bauder and McMillian 1998, p. 56; Keeley and Zedler 1998, p. 6). These statements are supported by careful review of the species' habitat, ecology, and life-history requirements. Based on these habitat and life-history traits, we conclude that the additional occurrences detected since listing both within and to the north of the species known geographical range at the time of listing were likely present prior to listing but occurred in areas that had not been surveyed for Riverside fairy shrimp prior to listing.

If the proposed revised rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

**Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion of a particular area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of excluding a particular area, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of Riverside fairy shrimp, the benefits of critical habitat

include public awareness of the presence of Riverside fairy shrimp and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for Riverside fairy shrimp due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for activities conducted, funded, permitted, or authorized by Federal agencies.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed revised critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES**).

#### *Draft Economic Analysis*

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised critical habitat designation for Riverside fairy shrimp. The DEA describes the economic impacts of all known potential conservation efforts for Riverside fairy shrimp; some of these costs will likely be incurred regardless of whether we designate revised critical habitat.

The DEA separates conservation efforts into two distinct categories according to “without critical habitat” and “with critical habitat” scenarios. The “without critical

habitat” scenario represents the baseline for the analysis, considering protections that are already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of revised critical habitat for the species. In other words, the incremental conservation efforts and associated economic impacts would not occur but for the designation. Conservation efforts implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these efforts are not quantified. Economic impacts are only quantified for conservation efforts implemented specifically due to the designation of critical habitat (i.e., incremental impacts). For a further description of the background and methodology of the analysis, including relevant court case precedent, see Chapter 2, “Framework for the Analysis” of the DEA (Industrial Economics, Inc. (IEC) 2011, pp. 2–1 to 2–24). The DEA also discusses the potential benefits associated with the designation of critical habitat, but does not monetize these benefits.

The 2005 Economic Analysis considered both pre-designation (from the listing of the species in 1993 through 2004) and post-designation (2005 through 2025) impacts to activities occurring within the study area (which is defined as the area proposed for critical habitat designation), referred to as a “co-extensive analysis.” Since that time, however, courts in other cases have held that an incremental analysis of impacts stemming solely from the critical habitat rulemaking is proper, and as such, is the current DEA framework approach used by the Service.

The DEA provides estimated costs of the probable economic impacts of the proposed critical habitat designation for the Riverside fairy shrimp over a 24-year time horizon (beginning in 2012 and ending in 2035), which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 24-year timeframe (for example, regional development projections end in 2035). The DEA identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies potential economic impacts of Riverside fairy shrimp conservation efforts associated with the following categories of activity: (1) agricultural, commercial, and residential development; (2) transportation; and (3) livestock grazing and other activities (IEC 2011, p. ES-4 and in Exhibit ES-3). The DEA presents a distribution of future impacts to development activities using a “low-end” scenario (10<sup>th</sup> percentile development costs with a low-end cost of transportation) with a “high-end” scenario (90<sup>th</sup> percentile development costs with the high-end costs from transportation) (IEC 2011, p. ES-5). Both totals include the incremental costs attributable to habitat management activities.

In total, the potential incremental impacts of proposed revised critical habitat designation for Riverside fairy shrimp are estimated to be \$1.75 million to \$2.87 million (\$166,000 to \$273,000 on an annualized basis), assuming a 7 percent discount rate (IEC 2011, p. ES-5). Approximately 90 percent of these incremental costs result from time delays to development activities; the remaining portion results from administrative costs



of considering adverse modification in section 7 consultations and conducting environmental assessments to comply with the California Environmental Quality Act (CEQA). Baseline impacts associated with consideration of Riverside fairy shrimp and its habitat were not quantified.

For development activities within the study area from year 2012 to year 2035, we estimate the 10<sup>th</sup> to 90<sup>th</sup> percentile of incremental impacts (including direct and indirect costs) for forecasted development activities to be \$1.71 million to \$2.77 million, assuming a 7 percent discount rate, which is \$163,000 to \$265,000 in annualized impacts. These cost estimates include the direct costs of section 7 consultations, as well as the indirect costs of project time delays and CEQA assessments. Time delays account for approximately 90 percent of the total impacts. Given spatial and regulatory uncertainties within the proposed revised critical habitat area, the analysis presents incremental impacts to development activities as a distribution of possible outcomes (see “Chapter 4–Potential Economic Impacts to Development Activities”; IEC 2011, pp. 4–1 to 4–34).

Total estimated incremental impacts to transportation activities are limited to the administrative costs of consultation. These consultations may result in project modifications; however, the timing and nature of any such modifications remain uncertain and, therefore, are not quantified in the analysis. Generally, impacts to transportation activities are limited due to the low density of roads and the few planned transportation projects within areas of proposed critical habitat. Incremental impacts to transportation activities are estimated to be \$9,560 (low-end scenario) to \$37,500 (high-

end scenario) (\$779 low end to \$3,050 high-end, when annualized), at a 7 percent discount rate (IEC 2011, p. 5–3 and in Exhibit 5–1).

Estimated incremental impacts to habitat conservation activities (years 2012–2035) are estimated to be \$46,200 (\$3,770 annualized), at a 7 percent discount rate (IEC 2011, pp. 5–4 and in Exhibit 5–2). Impacts are attributed to future incremental administrative costs of section 7 consultations related to habitat management activities. Incremental costs are assumed to be \$405 per technical assistance and \$2,380 per informal consultation. Because these projects generally benefit critical habitat, incremental project modifications are not anticipated.

Incremental costs are generally limited to administrative efforts of new and reinitiated consultations to consider adverse modification of critical habitat for Riverside fairy shrimp, administrative costs of complying with the CEQA, and time delays resulting from both processes. The proposed critical habitat area is unlikely to generate economic impacts beyond administrative costs of section 7 consultation for several reasons:

(1) Forty-one percent of the proposed revised critical habitat designation already receives protection through the various regional Habitat Conservation Plans (HCPs) and areas proposed as revised critical habitat receive a significant level of baseline protection through various Federal and State regulations, in addition to avoidance, minimization and mitigation measures afforded by existing HCPs.

(2) All subunits except for one are currently known to be occupied by the species, and thus these areas will require consultation regardless of the designation due to the species being listed. In subunits without existing baseline protection (Subunit 1b), surveys are frequently undertaken to comply with the CEQA because all subunits contain vernal pools or seasonally ponded habitats.

(3) Additionally, we recognize project modifications necessary to avoid a determination of adverse modification of critical habitat under section 7 of the Act may be different from the measures necessary to avoid a jeopardy determination for the species. However, at this point in time, we do not know what these specific project modifications are likely to be. We are seeking public comments to provide information on what the additional project modifications associated with an adverse modification analysis might represent.

(4) Little development activity is forecasted within the proposed revised critical habitat units. Twenty-four of the 25 subunits contain some privately owned land; however, a major portion of proposed revised critical habitat falls within existing HCP habitat preserves, or other conservation areas. Furthermore, many of the privately owned acres are already set aside for mitigation.

We also do not anticipate designation of revised critical habitat to result in any appreciable incremental economic benefits. Any economic benefits related to conservation efforts would flow from the listing of the species, rather than the

designation of critical habitat, and would fall within the economic baseline. The analysis also addresses the distribution of impacts associated with the designation, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation efforts on small entities and the energy industry.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed revised rule and our amended required determinations. We may revise the proposal or supporting documents to incorporate or address information we receive during the public comment periods. In particular, we may exclude an area from revised critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided that exclusion will not result in the extinction of this species.

#### **Required Determinations—Amended**

In our June 1, 2011, proposed revised rule (76 FR 33880), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on the DEA data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed revised designation would result in a significant economic impact on a

substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for Riverside fairy shrimp would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development, transportation, and other human activities, which include habitat management and livestock grazing. In order to determine whether it is

appropriate for our agency to certify that this proposed revised rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually (for example, “small business,” “small governmental jurisdiction,” and “small organization”). We apply the “substantial number” test individually to each industry to determine if certification is appropriate. However, the RFA does not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Revised critical habitat designation will not affect activities that do not have any Federal involvement; designation of revised critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed revised critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation efforts related to the proposed critical habitat for Riverside fairy shrimp. The analysis is based on the estimated impacts associated with the proposed rulemaking as described in Chapters 4, 5, and Appendix A

of the DEA, and evaluates the potential for economic impacts related to activity categories including residential development, transportation, and other human activities, including habitat management, livestock grazing and water management, as well as impacts to the energy industry (IEC 2011, pp. 4–1 to 6–6; pp. A–1 to A–7).

As described in Chapters 4 and 5 of the DEA, estimated incremental impacts consist primarily of administrative costs and time delays associated with section 7 consultation and CEQA review. The Service and the action agency are the only entities with direct compliance costs associated with this proposed critical habitat designation, although small entities may participate in section 7 consultation as a third party. It is, therefore, possible that the small entities may spend additional time considering critical habitat during section 7 consultation for the Riverside fairy shrimp. The DEA indicates that the incremental impacts potentially incurred by small entities are limited to development activities.

In the DEA, to understand the potential impacts on small entities attributable to development activities, we conservatively assumed that all of the private owners of developable lands affected by proposed revised critical habitat designation are developers. We estimated that a total of 34.2 development projects may be affected by the proposed revised critical habitat designation, or 1.42 projects per year. Costs per project range from \$5,000 where incremental costs are limited to the additional cost of considering adverse modification during a section 7 consultation, to \$1.07 million where additional effort to comply with CEQA may be required and time delays occur in areas



with the highest land values. Because we are unable to identify the specific entities affected, the impact relative to those entities' annual revenues or profits is unknown. Assuming that the entities are small land subdividers with annual revenues less than \$7 million, the high-end impacts represent approximately 15.2 percent of annual revenues. Of the total number of entities engaged in land subdivision and residential, commercial, industrial and institutional construction, 97 percent are small entities. Provided the assumptions that development activity occurs at a constant pace throughout the timeframe of the analysis, and each project is undertaken by a separate entity, we estimated that approximately two to three developers may be affected by the proposed revised critical habitat designation each year. Conservatively assuming that costs are borne by current landowners, and all landowners are land subdividers or construction firms, less than 3 percent or 1 percent, respectively, of all small entities in these sectors would be affected when the final rule is published (IEC 2011, p. A-5).

Our analysis constitutes an evaluation of not only potentially directly affected parties, but those also potentially indirectly affected. Under the RFA and following recent case law, we are only required to evaluate the direct effects of a regulation to determine compliance. Since the regulatory effect of critical habitat is through section 7 of the Act, which applies only to Federal agencies, we have determined that only Federal agencies are directly affected by this rulemaking. Other entities, such as small businesses, are only indirectly affected. However, to better understand the potential effects of a designation of critical habitat, we frequently evaluate the potential impact to those entities that may be indirectly affected, as was the case for this rulemaking. In doing so,

we focus on the specific areas being designated as critical habitat and compare the number of small business entities potentially affected in that area with other small business entities in the regional area, versus comparing the entities in the area of designation with entities nationally—which is more commonly done. This analysis results in an estimation of a higher number of small businesses potentially affected. In this rulemaking, we calculate that less than 3 percent or 1 percent (assuming that all landowners are land subdividers or construction firms), respectively, of all small entities in the area would be affected when the final rule is published. If we were to calculate that value based on the proportion nationally, then our estimate would be significantly lower than 1 percent. Following our evaluation of potential effects to small business entities from this rulemaking, we do not believe that the small businesses in the affected sector represent a substantial number.

The DEA also concludes that none of the government entities with which the Service might consult on Riverside fairy shrimp for transportation or habitat management activities meet the definitions of small as defined by the Small Business Act (SBA) (IEC 2011, p. A–6); therefore, impacts to small government entities due to transportation and habitat management activities are not anticipated. A review of the consultation history for Riverside fairy shrimp suggests future section 7 consultations on livestock grazing (for example, ranching operations) and water management are unlikely, and as a result are not anticipated to be affected by the proposed rule (IEC 2011, pp. A–6 to A–7).

In summary, we have considered whether the proposed revised designation would result in a significant economic impact on a substantial number of small entities and the energy industry. Information for this analysis was gathered from the Small Business Administration, stakeholders, and from Service files. We determine that less than three percent of land subdividers or one percent of construction firms engaged in development activity within the area proposed for designation would be affected if the final rule is published as proposed (IEC 2011, p. A-5). For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revised critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

### **References Cited**

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at <http://www.regulations.gov> or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

### **Authors**

The primary authors of this notice are the staff from the Carlsbad Fish and Wildlife Office, Pacific Southwest Region, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).



**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: February 22, 2012

Rachel Jacobson

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310–55–S

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